35A Am. Jur. 2d Federal Tort Claims Act IV A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Federal Tort Claims Act

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IV. Effect of Doctrine of Respondeat Superior

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, United States 861, 862, 879

A.L.R. Library

A.L.R. Index, Federal Tort Claims Act (FTCA)
West's A.L.R. Digest, United States 861, 862, 879

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35A Am. Jur. 2d Federal Tort Claims Act § 98

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Federal Tort Claims Act

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IV. Effect of Doctrine of Respondeat Superior

A. In General

§ 98. Doctrine of respondeat superior, generally

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West's Key Number Digest

West's Key Number Digest, United States 861, 862

A.L.R. Library

Federal Tort Claims Act: When is government officer or employee "acting within the scope of his office or employment" for purpose of determining government liability under 28 USC sec. 1346(b), 6 A.L.R. Fed. 373

Forms

Am. Jur. Pleading and Practice Forms, Federal Tort Claims Act § 82 (Answer—Defense—Lack of subject matter jurisdiction—Employee not acting within scope of employment)

Primary Authority

Federal Procedural Forms § 63:120 (Defense in answer—Lack of subject matter jurisdiction—Employee not acting within scope of employment [28 U.S.C.A. §§ 1346(b), 2671 et seq.; Fed. R. Civ. P. 8(c), 12(b)])

Under the Federal Tort Claims Act (FTCA), the United States is to be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.[1] Likewise, under the FTCA, federal courts have jurisdiction

over actions for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of their office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[2] The Federal Tort Claims Act in substance adopts respondeat superior liability for the United States.[3] Tort plaintiffs may bring against the federal government the same kind of ordinary tort action that plaintiffs often bring against private employers, namely an action claiming that the employee wrongfully hurt the plaintiff and that the employer is liable under the doctrine of respondeat superior.[4]

The FTCA expressly declares that "acting within the scope of his office or employment in the case of a member of the military or naval forces of the United States, or a member of the National Guard, means acting in the line of duty."[5] The term "acting in line of duty," as used in the FTCA, merely invokes the state law of respondeat superior, notwithstanding that the term has a military sound and, apparently a different meaning when used in connection with benefit claims of military personnel against the government.[6]

Footnotes

1 § 2.

2 28 U.S.C.A. § 1346(b)(1).

3 Ouellette v. Beaupre, 977 F.3d 127 (1st Cir. 2020).

4 Dumansky v. U.S., 486 F. Supp. 1078, 29 Fed. R. Serv. 2d 279 (D.N.J. 1980).
Postal Service officials' motion to dismiss or for a summary judgment was been granted in a suit by a letter carrier alleging tortious interference with employment and defamation, where the officials investigated the carrier's disability claim, scheduled independent examinations, and requested that the carrier return to work, since such duties were within the scope of the officials' employment and the law creates respondeat superior immunity for federal employees. Meyer v. Runyon, 869 F. Supp. 70, 7 A.D.D. 1039 (D. Mass. 1994).

5 28 U.S.C.A. § 2671.

6 McCall v. U.S., 338 F.2d 589 (9th Cir. 1964).

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IV. Effect of Doctrine of Respondeat Superior

A. In General

§ 99. Applicable law governing concept of respondeat superior

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, United States 861

The determination of whether a government employee's actions were within the scope of employment, so as to require the substitution of the United States as the party defendant under the Federal Tort Claims Act is to be determined according to the applicable respondeat superior rules in the state where the incident occurred.[1] Accordingly, where the government reserved the right to control an Air Force major's movement in driving his car between Air Force bases by allowing him only one day in which to travel between the bases, the major was acting within the scope of his employment under state law when he allegedly negligently caused a motor vehicle collision.[2] Also, an Army employee's suit alleging harassment by supervisors has been dismissed, where the supervisors were acting within the scope of their employment under state law and no administrative tort for which the U.S. could be liable was alleged.[3]

Footnotes

1 Wilson v. Libby, 535 F.3d 697 (D.C. Cir. 2008); Mensah-Yawson v. Raden, 170 F. Supp. 3d 222 (D.D.C. 2016); De Baca v. United States, 399 F. Supp. 3d 1052 (D.N.M. 2019); Rodriguez v. Velez-Pagan, 341 F. Supp. 3d 203 (E.D. N.Y. 2018), aff'd, 788 Fed. Appx. 67 (2d Cir. 2019); Bansal v. Russ, 513 F. Supp. 2d 264 (E.D. Pa. 2007); Harris v. U.S., 340 F. Supp. 2d 764 (S.D. Tex. 2004).

2 Robbins v. U.S., 722 F.2d 387 (8th Cir. 1983).

3 Rallis v. Stone, 821 F. Supp. 466 (E.D. Mich. 1993).

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IV. Effect of Doctrine of Respondeat Superior

A. In General

§ 100. Applicability of respondeat superior to independent contractors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, United States 862, 879

A.L.R. Library

When Is Federal Agency Employee Independent Contractor, Creating Exception to United States Waiver of Immunity Under Federal Tort Claims Act (28 U.S.C.A. s2671), 166 A.L.R. Fed. 187

The Federal Tort Claims Act's (FTCA) definition of "employee of the government" includes employees of any federal agency,[1] but the Act's definition of "federal agency" specifically excludes any contractor with the United States.[2] The United States is generally not liable under the FTCA for either the negligence of an independent contractor[3] or the negligence of the employees of an independent contractor.[4]

The determination of whether one is an employee of the United States or of an independent contractor turns on the authority of the Government to control the detailed physical performance of the contractor;[5] if the principal controls the conduct, the contractor is an employee rather than an independent contractor.[6] A crucial factor in distinguishing between a federal employee and an independent contractor, for purposes of determining whether the government's immunity has been waived under the FTCA is whether the federal government has the power to control the detailed physical performance of the contractor, and broad supervisory control, even on a daily basis, does not suffice to demonstrate control over the physical performance of the contractor.[7] When determining whether the federal government retains power to control the detailed physical performance of an individual hired by the government, such that individual is considered an employee and the government may be held liable for the individual's actions under the Federal Tort Claims Act (FTCA), the court focuses on whether government supervises the day-to-day operations of the individual and considers (1) the intent of the parties, (2) whether the government controls only the end result or may also control the manner and method of reaching the result, (3) whether the person uses their own equipment or that of the government, (4) who provides liability insurance and social security tax, (5) whether federal employees are prohibited from performing such contracts, and (6) whether the individual has

the authority to subcontract.[8] Contract provisions permitting periodic government inspection of a contractor's performance,[9] as well as provisions giving a contractor full responsibility for the renovation and realignment of a facility and requiring the contractor to take proper safety and health precautions to protect the work, workers, public, and property of others,[10] do not provide sufficient control to make the employees of the contractor the employees of the United States.

Workers were also found to be independent contractors, rather than federal employees, under the particular circumstances of the case, such as where—

— even assuming a contract between the government and a contractor to dispose of fireworks gave the government the ability to enforce safety regulations regarding the fireworks' disposal, the personnel of contractor and its own subcontractor were still not employees of the federal government.[11]

— although the physician was performing an official act at the government's direction when he examined the decedent's x-rays and failed to properly read the chest x-rays, resulting in failure to diagnose the decedent's lung cancer, the physician was acting in his capacity as an independent contractor, and the fact that he performed services at the government's direction did not change the physician's status to that of an employee.[12]

— the responsibilities that the Department of Housing and Urban Development (HUD) retained after entering an area management broker contract.

— determining the asking price for a property, authorizing repairs over $1,000, reassessing the property every 30 days, and deciding whether to rent the property.

— were not "day-to-day duties," so the broker was not a federal "employee."[13]

— although under the contract between the Federal Aviation Administration (FAA) and a company employing traffic controllers, the FAA retained the power to designate the hours of operations, set the controllers' qualifications, and chose the equipment, the company was an independent corporation, it decided when to hire and fire its employees, it set the controllers' salaries and benefits, the FAA had no control over the company's finances, and the FAA gave the company complete dominion over the training and quality assurance initiatives.[14]

— a management company hired by the Department of Housing and Urban Development (HUD) to manage and market property was, under a contract, in charge of the day-to-day management and marketing of property, notwithstanding that the HUD retained power to authorize repairs in the event of fire or natural disaster and to restrict the assignment of company employees that it deemed a threat to the mission of the HUD.[15]

However, an agency's failure to carry out its mandatory safety responsibilities has been held to establish a situation in which the applicable employees may be found to be government employees under the FTCA.[16]

Workers were also deemed to be federal employees, under the particular circumstances of the cases, where—

— the agreement for a company hired to perform service on ships stated that the United States was appointing the company as its agent and not as an independent contractor, a Maritime Administration (MARAD) representative monitored the company's performance, the government had contractual authority to control performance in detail, and the MARAD instructed the company in detail as to what actions it should take in advising a contractor of its default.[17]

— although the worker was an independent contractor, the United States Postal Service (USPS) controlled the detailed physical performance of her position and exercised substantial supervision over her day-to-day activities, including such things as how many times to turn a mop over, as well as when and how to place safety signs.[18]

Observation:

It has been stated that in adopting the independent contractor exception to liability, Congress did not simultaneously adopt exceptions to that doctrine, such as the exception for nondelegable duties, and that the FTCA precludes liability without fault.[19] In other states however, the rule appears to be to the contrary.[20]

Footnotes

1 § 8.

2 § 11.

3 Rutten v. U.S., 299 F.3d 993 (8th Cir. 2002); Phillips v. Federal Bureau of Prisons, 271 F. Supp. 2d 97 (D.D.C. 2003); De Baca v. United States, 399 F. Supp. 3d 1052 (D.N.M. 2019); Hentnik v. U.S., 2003 WL 22928648 (S.D. N.Y. 2003).

4 Macharia v. U.S., 334 F.3d 61 (D.C. Cir. 2003); Alvarez v. United States, 207 F. Supp. 3d 1291 (M.D. Fla. 2016), aff'd, 862 F.3d 1297 (11th Cir. 2017); Alinsky v. U.S., 156 F. Supp. 2d 908 (N.D. Ill. 2001); Flanagan v. U.S., 430 F. Supp. 2d 106 (W.D. N.Y. 2006).

5 U.S. Tobacco Cooperative Inc. v. Big South Wholesale of Virginia, LLC, 899 F.3d 236 (4th Cir. 2018).

6 Norman v. U.S., 111 F.3d 356 (3d Cir. 1997); Batieste v. U.S., 100 Fed. Appx. 959 (5th Cir. 2004); Corpeno-Argueta v. United States, 341 F. Supp. 3d 856 (N.D. Ill. 2018); De Baca v. United States, 399 F. Supp. 3d 1052 (D.N.M. 2019).

7 U.S. Tobacco Cooperative Inc. v. Big South Wholesale of Virginia, LLC, 899 F.3d 236 (4th Cir. 2018); Macharia v. U.S., 238 F. Supp. 2d 13 (D.D.C. 2002), aff'd, 334 F.3d 61 (D.C. Cir. 2003).

8 Curry v. U.S., 97 F.3d 412 (10th Cir. 1996); De Baca v. United States, 399 F. Supp. 3d 1052 (D.N.M. 2019).

9 Berkman v. U.S., 957 F.2d 108 (4th Cir. 1992); Verizon Washington, D.C., Inc. v. United States, 254 F. Supp. 3d 208 (D.D.C. 2017).

10 Rhoades v. U.S., 950 F. Supp. 623 (D. Del. 1996).

11 Cabalce v. VSE Corp., 914 F. Supp. 2d 1145 (D. Haw. 2012).

12 Rutten v. U.S., 299 F.3d 993 (8th Cir. 2002).

13 Tisdale v. U.S., 62 F.3d 1367 (11th Cir. 1995).

14 Alinsky v. U.S., 156 F. Supp. 2d 908 (N.D. Ill. 2001).

15 Smith v. Steffens, 429 F. Supp. 2d 719 (E.D. Pa. 2006) (holding that the HUD was not liable under the FTCA for injuries suffered by prospective buyers when a staircase collapsed, since the contract required the management company, the independent contractor, to routinely inspect the property and promptly correct any condition presenting safety hazard).

16 Phillips v. U.S., 956 F.2d 1071 (11th Cir. 1992).

17 B & A Marine Co., Inc. v. American Foreign Shipping Co., Inc., 23 F.3d 709 (2d Cir. 1994).

18 Johnson v. U.S., 132 Fed. Appx. 715 (9th Cir. 2005).

19 Roditis v. U.S., 122 F.3d 108 (2d Cir. 1997).

20 Dickerson, Inc. v. U.S., 875 F.2d 1577 (11th Cir. 1989) (holding that the independent contractor exception in the FTCA would not insulate the government from the negligence of a contractor hired to dispose of oil containing PCBs from defense installations if that duty was nondelegable under state law).

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IV. Effect of Doctrine of Respondeat Superior

B. Particular Conduct as Within Scope of Office or Employment or Line of Duty

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, United States 877, 878, 880(1) to 880(3), 941 to 946

A.L.R. Library

A.L.R. Index, Federal Tort Claims Act (FTCA)
West's A.L.R. Digest, United States 877, 878, 880(1) to 880(3), 941 to 946

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IV. Effect of Doctrine of Respondeat Superior

B. Particular Conduct as Within Scope of Office or Employment or Line of Duty

§ 101. Conduct within scope of office or employment for purposes of respondeat superior, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, United States 877, 878

A.L.R. Library

When Has Federal Employee Acted Within Scope of Employment for Purposes of Westfall Act, 28 U.S.C.A. sec. 2679, Permitting Substitution of United States as Defendant in Action Asserting Intentional Tort Involving Personal Injury or Death or Threats Thereof, 7 A.L.R. Fed. 2d 179

Federal Tort Claims Act: When is government officer or employee "acting within the scope of his office or employment" for purpose of determining government liability under 28 USC sec. 1346(b), 6 A.L.R. Fed. 373

Trial Strategy

Proof of Employee Status Under Federal Tort Claims Act (FTCA), 137 Am. Jur. Proof of Facts 3d 109

Proving the Existence of an Employment Relationship, 22 Am. Jur. Proof of Facts 3d 353

Forms

Am. Jur. Pleading and Practice Forms, Federal Tort Claims Act § 82 (Answer—Defense—Lack of subject matter

jurisdiction—Employee not acting within scope of employment)

An alleged tortfeasor's status as an employee of the government is the sine qua non of liability under the Federal Tort Claims Act.[1] Whether a federal employee's action falls within the scope of employment for purposes of substituting the United States as the defendant pursuant to the Westfall Act[2] is to be determined according to the rules of respondeat superior of the state in which the wrongful conduct occurred.[3] Generally, the scope-of-employment questions in Federal Tort Claims Act (FTCA) cases are governed by the law of the state where the alleged tortious acts took place.[4]

The various states appear to differ with regard to the determination of whether an alleged tort falls within the scope of employment of the alleged tortfeasor. In one state, the well-settled rule is that the commission of an assault upon a third person is not within the scope of an employee's employment, and the employer is not liable for such an assault, although committed while the employee was about the employer's business.[5] In another jurisdiction, an act may be deemed within the scope of employment even though it is criminal or tortious, if it occurs while pursuing the business of the employer, but if the employee committing the crime is acting solely for its own benefit, the employer is not liable.[6] A third jurisdiction bases its determination on the Restatement of Agency approach, in determining whether an employee acted within the scope of employment, whereby the Restatement provides that the conduct of a servant is within the scope of employment if, but only if (1) it is of the kind the person is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the master; and (4) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.[7]

To qualify as conduct of the type that the alleged tortfeasor was employed to perform, the actions must have been either of the same general nature as that authorized, or incidental to the conduct authorized.[8] Conduct is "incidental" to an employee's legitimate duties if it is foreseeable, that is, the alleged conduct must be a direct outgrowth of the employee's instructions or job assignment. It is not enough that an employee's job provides an opportunity to commit an intentional tort,[9] rather, the alleged tort must arise out of the transaction which initially brought the parties together.[10]

Practice Tip:

If a plaintiff comes forward with competent evidence that would permit a conclusion contrary to the Attorney General's certification that the defendant was acting within the scope of employment, the defendant and the government, after discovery if desired, are entitled to an evidentiary hearing at which the district court will resolve all issues of law and fact relevant to the issue and find whether the defendant did or did not act within the scope of employment.[11]

Footnotes

1 Bragg v. U.S., 810 F. Supp. 2d 1307 (N.D. Fla. 2011).

2 28 U.S.C.A. § 2679.

3 § 99.

4 Johnson v. U.S., 534 F.3d 958 (8th Cir. 2008).

[5] Flechsig v. U.S., 786 F. Supp. 646 (E.D. Ky. 1991), aff'd, 991 F.2d 300 (6th Cir. 1993).

[6] Melton v. U.S., 488 F. Supp. 1066 (D.D.C. 1980).

[7] Restatement Second, Agency § 228.

[8] Restatement Second, Agency § 229.

[9] Boykin v. District of Columbia, 484 A.2d 560, 21 Ed. Law Rep. 868 (D.C. 1984).

[10] Haddon v. U.S., 68 F.3d 1420 (D.C. Cir. 1995) (abrogated on other grounds by, Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007)).

[11] Melo v. Hafer, 13 F.3d 736 (3d Cir. 1994).
As to the Attorney General's certification, see § 3.

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IV. Effect of Doctrine of Respondeat Superior

B. Particular Conduct as Within Scope of Office or Employment or Line of Duty

§ 102. Application of rules determining conduct within scope of office or employment for purposes of respondeat superior

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, United States 877, 878, 880(1) to 880(3)

Forms

Am. Jur. Pleading and Practice Forms, Federal Tort Claims Act §§ 54, 79, 82, 83 (Forms relating to person acting on behalf of the government)

Under the Federal Tort Claims Act, the alleged torts have been found to be outside of the scope of an alleged tortfeasor's employment, in such instances as where—

— a border agent sexually assaulted an alien and her daughter.[1]

— an automobile driver was driving to a National Guard training at the time of a collision with the plaintiff-decedent's automobile, since the government did not have the right to direct the means and manner of his travel or to control him.[2]

— a United States Postal Service (USPS) coemployee allegedly sexually assaulted an employee at her home, since USPS policy prohibited acts of sexual misconduct, the alleged conduct took place while the coemployee was off duty, the alleged conduct was not motivated by a desire to serve the USPS, the USPS could not have expected the alleged conduct, and the coemployee used a pretext having nothing to do with his employment.[3]

— an instructor at a tribally controlled school was working on a privately owned snowmobile and a potential buyer of the snowmobile was injured while taking a test drive, since the work, although occurring in the school shop, took place on a Sunday morning and had no relationship to the instructor's school duties or responsibilities.[4]

On the other hand, the alleged torts were within the scope of the alleged tortfeaser's employment, in such instances as where—

— an Assistant U.S. Attorney and Chief of Criminal Investigation Division of the IRS made defamatory statements about a plaintiff, although their statements were not authorized, since the Justice Department could foresee that the AUSA might abuse its power to inform the public about arrests, indictments, and convictions, the AUSA made the statements as a means

of accomplishing the Justice Department's objective of informing the public of recent law enforcement efforts and were actuated by the intention to serve his employer, and one of the IRS agent's duties was to inform the public about tax and other cases in which the IRS was involved.[5]

— employees of a Social Security office of hearings and appeals wrote a letter complaining about an administrative law judge's job performance and sent it to the chief administrative judge presiding over a pending case involving the ALJ, since they were not acting exclusively for their own interest but for the benefit of the SSA and furthering its purpose.[6]

— Indian tribes and their employees are deemed employees of the United States Bureau of Indian Affairs when they are carrying out functions authorized in or under a self-determination contract.[7]

— the alleged conduct of a National Aeronautic and Space Administration (NASA) employee's coemployees, consisting of personal hostility, backbiting, resentment of the employee's success, false rumors, and malicious gossip, arising from professional jealousies related to the employee's development of a "pressure sensitive paint," and even assuming the coemployees took the alleged actions out of malice or carelessness, the entire affair took place at work, in ways relating to work, on issues arising out of work.[8]

— an Federal Bureau of Investigation (FBI) agent, who was aware that small business owners reported to the police that they were the victims of extortion by racketeers, passed the names of the owners on to the racketeers whom the agents were protecting as informants, and the necessary intent to serve the FBI interest was shown by results of their cultivation of the racketeers, in the form of information useful in various anticrime activities.[9]

— a city police officer was acting as a Task Force Officer of the Drug Enforcement Agency (DEA) at the time of search of a food distribution business, and the United States Attorney certified that the officer was a federal employee acting within the scope of employment, and the business owner did not present any evidence refuting the United States Attorney's certification.[10]

— a federal employee made allegedly defamatory statements, that a contract security officer was involved in the theft of property from baggage, since the statements were made while the federal employee was performing his supervisory duties, the statements related to undercover investigation of persons under his supervision, and it was foreseeable that the employee would have to make statements concerning his perception of the likely culpability of persons under investigation even if the statements reflected an incorrect assessment of the officer's involvement.[11]

— a Congressman made allegedly defamatory remarks about a commentator during an interview with a television reporter concerning the commentator's charge that the Congressman was aiding terrorism through his support of an Islamic organization, and the substitution of the United States as a party defendant in the commentator's tort suit was appropriate under the Westfall Act.[12]

— a tribal law enforcement officer, being paid under a natural resources self-determination contract, was performing functions under a law enforcement self-determination contract when he was involved in an accident while driving to assist another tribal law enforcement officer.[13]

— a program center coordinator of the Department of Housing and Urban Development (HUD) issued a report to the city housing authority listing deficiencies in the performance of its executive director, supporting the substitution of the United States as the defendant in the executive director's action against the coordinator for tortious interference with a contract, since the coordinator was responsible for oversight of the housing authority, and acted at the direction of her supervisor when she issued the report.[14]

Footnotes

1 M.D.C.G. v. United States, 956 F.3d 762 (5th Cir. 2020).

2 Walsh v. U.S., 31 F.3d 696 (8th Cir. 1994).

3 Doughty v. U.S. Postal Service, 359 F. Supp. 2d 361 (D.N.J. 2005).

4 Mentz v. U.S., 359 F. Supp. 2d 856 (D.N.D. 2005).

5 Aversa v. U.S., 99 F.3d 1200 (1st Cir. 1996).

6 Lawson v. U.S., 103 F.3d 59 (8th Cir. 1996).

7 Stearney v. United States, 392 F. Supp. 3d 1037 (D. Ariz. 2019).

[8] McLachlan v. Bell, 261 F.3d 908 (9th Cir. 2001).

[9] Rakes v. U.S., 352 F. Supp. 2d 47 (D. Mass. 2005), aff'd, 442 F.3d 7 (1st Cir. 2006).

[10] Chin v. Wilhelm, 291 F. Supp. 2d 400 (D. Md. 2003).

[11] Asto v. Mirandona, 372 F. Supp. 2d 702 (E.D. N.Y. 2005).

[12] Chapman v. Rahall, 399 F. Supp. 2d 711 (W.D. Va. 2005).

[13] Big Crow v. Rattling Leaf, 2004 DSD 1, 296 F. Supp. 2d 1067 (D.S.D. 2004).

[14] Johnson v. Chapman, 327 F. Supp. 2d 895 (E.D. Tenn. 2004).

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IV. Effect of Doctrine of Respondeat Superior

B. Particular Conduct as Within Scope of Office or Employment or Line of Duty

§ 103. Servicemembers' conduct within scope of office or employment for purposes of respondeat superior

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, United States 880(1) to 880(3), 941 to 946

Forms

Am. Jur. Pleading and Practice Forms, Federal Tort Claims Act § 31 (Complaint—Personal injury—Negligence of United States Air Force in failing to control dog on military base—Dog bite injury to minor)

Liability under the Federal Tort Claims Act (FTCA) cannot attach for a member of the service unless the alleged negligence occurred while the service member was acting within the scope of employment.[1] Where an employee's conduct does not involve regular and specific military activity, the special characteristic of military employment does not bring the employee's conduct within the scope of employment for purposes of the FTCA.[2] A military service member may be on active duty, not on leave, at the time personal injuries are caused to another individual and still may not be deemed to be acting within the "scope of employment" for purposes of the FTCA.[3]

Observation:

One factor characteristic to military service that can be determinative of the scope-of-employment issue under the FTCA is whether the service member was traveling pursuant to specific orders when the negligent act was committed. Among other factors to be considered is whether the service member was governed by specific military regulations, enforceable by military punishment and designed precisely to govern the conduct in which the service member was engaged at the time of the accident.[4]

The general rule appears to be that the scope of employment decisions regarding military personnel must be based on the applicable state law.[5] It has been determined that military personnel were acting within the scope of their employment where—

— a physician was an active-duty commissioned officer in the Air Force and a borrowed servant of a private hospital where he was assigned to complete a residency in orthopedic surgery.[6]

— a claim by a bicyclist injured when struck by a vehicle driven by an intoxicated service member was properly dismissed since the allegation that the service member was working at the time was insufficient to establish that he was acting within the scope of his employment.[7]

— a military physician was serving as a resident in a private hospital at the time of an alleged malpractice, since the fact that the physician acted in the interests of the private hospital did not mean that he exceeded the scope of his government employment, and the interests of the federal government were furthered in a foreseeable and foreseen manner by the physician's service to the private hospital.[8]

— two Navy servicemen used gasoline to prime the carburetor of a servicemember's automobile located in a garage assigned to one of the servicemembers in a housing unit, resulting in injuries to a child who was burned by the gasoline, since the servicemembers, under state law, violated fire regulations which constituted a military duty imposed for the benefit of the Navy by naval regulations on servicemembers in housing units.[9]

— an Army officer was driving a rental car during the time he was attending a conference at the Army's instruction, since the Army was in the position to control the use of vehicles by personnel sent on a business trip so as to limit the risk of accidents, holding the U.S. liable would greatly increase the chance of recovery by the injured passenger, and the U.S. ought equitably to bear the losses arising from the Army personnel's participation in work-related conferences since it also benefits from it.[10]

— an off-duty soldier inadvertently shot the plaintiff with a personal handgun, since the handgun had not been registered, in violation of base regulations regarding privately owned weapons, the soldier concealed the handgun in a black nylon bag he was carrying when he arrived at another soldier's quarters pursuant to prior arrangements and began discussing which nightclub to attend and other plans for the evening with the other soldier and plaintiff, and none of the soldier's acts furthered or were intended to further his employer's purpose.[11]

— an Army sergeant was regularly required to travel to assist in the training of National Guard members and was on a "special mission" from the time he left the fort through the weekend of training maneuvers, and when, during the weekend, he was involved in an automobile collision while returning to his military billet.[12]

— an Army officer was in an automobile accident at a base, even though he was operating his own car at the time of the accident and no particular time frame had been set for him to arrive at his work station, since he was still on active duty.[13]

— a National Guard member was on duty.[14]

On the other hand, military personnel were not acting within the scope of their employment where—

— a federal agent with Office of Export Enforcement (OEE), driving home from work in a government vehicle after completing his shift, began argued with a motorcyclist while driving, the agent showed his gun to the motorcyclist, the two vehicles swerved back and forth, the agent struck the motorcyclist with his car, and the agent was not responding to an assignment from OEE when he crashed into the motorcyclist.[15]

— there was substantial evidence that the driver of an Army truck, which collided with a taxicab in which the injured plaintiff was riding, did not have the requisite express authority to use the government vehicle involved in the collision and that the use of the vehicle to make a personal telephone call outside the command post was neither an official duty nor connected to duties entrusted to him by the government.[16]

— in the course of a military sponsored blood drive, a servicemember donated blood contaminated with the virus that caused "Acquired Immunodeficiency Syndrome" (AIDS).[17]

— a Coast Guard member's negligence caused a fatal accident as he returned to his ship.[18]

— at the time of an accident, a servicemember on leave was pursuing his private business and affairs.[19]

Observation:

The Federal Drivers Act, added onto the Federal Tort Claims Act, bestows on the federal government exclusive responsibility for damage claims against its employees arising from the operation of vehicles within the scope of their employment.[20] The Act does not define "scope of employment," but instead looks to the law of the state in which the accident occurred.[21]

Footnotes

1 Beatty v. U.S., 983 F.2d 908, 24 Fed. R. Serv. 3d 1084 (8th Cir. 1993).
As to line of duty cases, see § 104.

2 Hartzell v. U.S., 786 F.2d 964 (9th Cir. 1986).

3 Hallett v. U.S., 877 F. Supp. 1423 (D. Nev. 1995).

4 Weaver v. U.S. Coast Guard, 857 F. Supp. 539 (S.D. Tex. 1994), aff'd, 53 F.3d 1282 (5th Cir. 1995).

5 Xue Lu v. Powell, 621 F.3d 944 (9th Cir. 2010); Pitt v. Matola, 890 F. Supp. 89 (N.D. N.Y. 1995).

6 Palmer v. Flaggman, 93 F.3d 196 (5th Cir. 1996).

7 Beatty v. U.S., 983 F.2d 908, 24 Fed. R. Serv. 3d 1084 (8th Cir. 1993).

8 Ward v. Gordon, 999 F.2d 1399 (9th Cir. 1993).

9 Washington v. U.S., 868 F.2d 332 (9th Cir. 1989).

10 Flohr v. Mackovjak, 84 F.3d 386 (11th Cir. 1996).

11 Bennett v. U.S., 102 F.3d 486 (11th Cir. 1996).

12 Fitzpatrick v. U.S., 754 F. Supp. 1023 (D. Del. 1991).

13 Pitt v. Matola, 890 F. Supp. 89 (N.D. N.Y. 1995).

14 Willis v. Skaff, 186 W. Va. 689, 414 S.E.2d 450 (1992).

15 Merlonghi v. U.S., 620 F.3d 50, 77 Fed. R. Serv. 665 (1st Cir. 2010).

16 White v. Hardy, 678 F.2d 485 (4th Cir. 1982).

17 Valdiviez v. U.S., 884 F.2d 196 (5th Cir. 1989).

18 Weaver v. U.S. Coast Guard, 857 F. Supp. 539 (S.D. Tex. 1994), aff'd, 53 F.3d 1282 (5th Cir. 1995).

19 Coto Orbeta v. U.S., 770 F. Supp. 54 (D.P.R. 1991).

20 Cronin v. Hertz Corp., 818 F.2d 1064 (2d Cir. 1987), referring to 28 U.S.C.A. § 2679(b).

21 Pitt v. Matola, 890 F. Supp. 89 (N.D. N.Y. 1995).

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35A Am. Jur. 2d Federal Tort Claims Act § 104

American Jurisprudence, Second Edition | May 2021 Update

Federal Tort Claims Act

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IV. Effect of Doctrine of Respondeat Superior

B. Particular Conduct as Within Scope of Office or Employment or Line of Duty

§ 104. Servicemembers' conduct within scope of office or employment for purposes of respondeat superior—Line of duty cases

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, United States 880(1) to 880(3), 941 to 946

In the case of a member of the military or naval forces of the United States, acting within the scope of its office or employment, for purposes of the Federal Tort Claims Act (FTCA), means acting in the line of duty, and the resolution of this issue is controlled by the state law of respondeat superior.[1] Since the FTCA equates "acting in line of duty" with "acting within the scope of his or her office or employment," special characteristics of military employment are to be taken into account in resolving questions of the government's respondeat superior liability for a servicemember's torts.[2]

The alleged torts did not occur in the line of duty, in instances where—

— a member of the Air Force failed to properly supervise a dog who bit the dependent of another Air Force member, even though the Air Force base had promulgated regulations requiring personnel to keep pets under control, since the regulations covered ancillary matters of housing and did not concern activities of the servicemember in "line of duty."[3]

— an off-duty Army soldier accidentally discharged a privately owned handgun that he possessed in violation of base regulations and injured another soldier, while in the barracks discussing social plans. The existence of base regulations governing the manner and method of a soldier's personal possession of a handgun did not draw compliance with that regulation within the scope of his employment, and when the shooting occurred, the soldier was engaged in purely personal matters unrelated to his responsibilities as soldier.[4]

— a drunken Coast Guardsman was involved in a three-fatality automobile accident while returning to his ship near the end of a four-hour liberty granted for personal errands prior to departure for the next assignment.[5]

On the other hand, under Texas law, a border patrol agent's alleged negligence in running over an alien with his vehicle and taking her to a distant location before calling an ambulance was based on actions that plainly fell within the scope of agent's employment, and the alien's negligence claim was precluded by Federal Tort Claims Act (FTCA) where the border patrol's purpose was to prevent illegal immigration, and in carrying out that mission the agent had the authority to pursue and detain aliens, and the agent's actions were taken for the accomplishment of his duties.[6]

Footnotes

1 Washington v. U.S., 868 F.2d 332 (9th Cir. 1989).

2 Blesy v. U.S., 443 F. Supp. 358 (W.D. N.Y. 1978).

3 Piper v. U.S., 887 F.2d 861 (8th Cir. 1989).

4 Bennett v. U.S., 102 F.3d 486 (11th Cir. 1996).

5 Weaver v. U.S. Coast Guard, 857 F. Supp. 539 (S.D. Tex. 1994), aff'd, 53 F.3d 1282 (5th Cir. 1995).

6 Carcamo-Lopez v. Does 1 through 20, 865 F. Supp. 2d 736 (W.D. Tex. 2011).

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Federal Tort Claims Act

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IV. Effect of Doctrine of Respondeat Superior

B. Particular Conduct as Within Scope of Office or Employment or Line of Duty

§ 105. Servicemembers' conduct within scope of office or employment for purposes of respondeat superior—Change of station cases

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, United States 880(1) to 880(3), 941 to 946

The answer to the question whether a member of the Armed Forces, in committing an allegedly wrongful act while proceeding to a new station assignment, was in the course of employment or in the line of duty so as to render the United States liable under the Federal Tort Claims Act (FTCA) depends on, among other things, the service member's orders, the extent of the government's control during the change, and the particular circumstances of the situation. Under the particular circumstances, the courts have held that the alleged torts did not occur in the line of duty or within the alleged tortfeasor's scope of employment where—

— a Navy serviceman while on travel orders, negligently caused an automobile accident during his free time on a frolic that substantially deviated from the purposes of the travel, notwithstanding that the government permitted the use of a prepaid rental car for his personal purposes while enjoying liberty during travel.[1]

— a Navy petty officer, who was traveling pursuant to written orders allotting him eight days of travel time and up to eight days in leave time, was involved in an automobile accident. The fact that the petty officer was subject to military discipline and modifications concerning his travel orders at the time of the accident did not establish that the Navy had reserved the right to control the petty officer's acts while he was traveling.[2]

— an accident involved an administrative specialist traveling from a temporary to a permanent duty station, where the specialist performed mostly clerical duties, driving her own vehicle for personal reasons was not typical of her work, and the accident occurred during a leave.[3]

— a servicemember, who was traveling via a private automobile between permanent duty stations at the time he was involved in an automobile accident while driving in the state of Idaho, where the right of the United States to control the servicemember was absent in that he was traveling merely during employment.[4]

On the other hand, the alleged torts did occur in the line of duty or within the alleged tortfeasor's scope of employment where—

— a soldier was involved in an accident while proceeding under Army orders for a permanent change of station, was compensated for his travel time, and was paid an allowance in advance for travel by private conveyance, where it appeared that the Army, by regulation or specific order, could have directed the exact route and placed limitations on the specific conduct of the soldier as a condition to issuing the order authorizing travel by private conveyance, and that these powers

gave the United States the right to direct and control the causal act or omission at the very instant of the occurrence of the act or neglect.[5]

— a servicemember who, while driving a truck, struck a jogger, since the servicemember was traveling from one duty station to another at the time of the incident, although the servicemember had taken a circuitous route that would permit him to stop at a convenience store. The servicemember was expected to report to both locations as part of his duty in the Marine Corps and never left the military enclave in his travels.[6]

— a soldier, who was returning to his home station after complying with orders to attend a six-month federal active-duty training period, was authorized to travel by private conveyance, was given a travel allowance for the mileage involved, was still on active duty at the time of the collision, was in a travel status, and was subject to military discipline.[7]

Footnotes

1 Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d 1158 (9th Cir. 2005).

2 Pyle v. U.S., 827 F.2d 360 (8th Cir. 1987).

3 Hartzell v. U.S., 786 F.2d 964 (9th Cir. 1986).

4 Garrett Freightlines, Inc. v. U.S., 529 F.2d 26 (9th Cir. 1976) (applying Idaho law).

5 U.S. v. Culp, 346 F.2d 35 (5th Cir. 1965).

6 Martinez v. U.S., 740 F. Supp. 399 (D.S.C. 1990).

7 Farmer v. U.S., 261 F. Supp. 750 (S.D. Iowa 1966), judgment aff'd, 400 F.2d 107 (8th Cir. 1968).

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